Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

JOHN HAMMONS, an individual, dba FULL CIRCLE DISTRIBUTING, a sole proprietorship,

Petitioner

v.

ALCAN ALUMINUM CORP. a Delaware corporation; ALUMINUM COMPANY OF AMERICA, a Pennsylvania corporation; ALUMAX INC., a Delaware corporation; KAISER ALUMINUM CORPORATION, a Delaware corporation; REYNOLDS METALS CO., a Delaware corporation; ALUMINUM ASSOCIATION, a Delaware corporation,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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56 pp

QUESTIONS PRESENTED

1. Whether the Political Question doctrine is a bar to an antitrust suit against private companies for conspiring to fix the price of aluminum when the Complaint does not challenge the wisdom or legality of a memorandum of understanding between sovereign nations.

2. Whether the Act of State Doctrine is a bar to an antitrust suit against private companies for conspiring to increase the prices of aluminum through the curtailment of production when the Complaint does not challenge any act by a sovereign nation in its own territory.

3. Whether the Noerr-Pennington Doctrine is a bar to an antitrust suit against private companies for conspiring to increase the prices of aluminum through the curtailment of production when the companies did not petition the United States Government to restrain aluminum production in the United States or to engage in domestic price fixing.

4. Whether the Aluminum Association has sufficient contacts with California so as to authorize the exercise of jurisdiction by the court.

5. Whether a Rule 12(b)(6) motion challenging an anti-trust suit alleging a conspiracy to increase aluminum prices, and a price fix through the curtailment of production, was properly converted into a Rule 56 motion before Petitioner was allowed to conduct discovery.

RULE 29.6 STATEMENT

In compliance with Supreme Court Rule 29.6, Petitioner JOHN HAMMONS hereby states that he is an individual who does business as a sole proprietor under the name FULL CIRCLE DISTRIBUTING. There are no parent companies, no subsidiaries, and no affiliates that have issued shares to the public.

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ALCAN ALUMINUM CORP. a Delaware corporation; ALUMINUM COMPANY OF AMERICA, a Pennsylvania corporation; ALUMAX INC., a Delaware corporation; KAISER ALUMINUM CORPORATION, a Delaware corporation; REYNOLDS METALS CO., a Delaware corporation; ALUMINUM ASSOCIATION, a Delaware corporation,

Respondents

PETITION FOR WRIT OF CERTIORARI

John Hammons respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals are unreported and are reprinted in the Appendix ("App.") at 1a-2a. The district court's May 28, 1996 minute order granting Respondent

Aluminum Association's motion to dismiss (App., *infra*, 16a-21a); the July 1, 1996 minute order granting Respondents' motion for summary judgment (App., *infra*, 7a-15a); and the July 12, 1998 minute order denying Petitioner's motion for reconsideration (App., *infra*, 5a-6a) are unreported.

JURISDICTION

The court of appeals entered its judgment on December 11, 1997 (App., *infra*, 1a). The court of appeals denied a timely petition for a rehearing on May 14, 1998 (App., *infra*, 2a). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

California Business and Professions Code §§ 16720 and 16750, are set forth in the Appendix (App., *infra*, 22a).

STATEMENT

Petitioner sued Respondents on March 5, 1996 in the Superior Court of Los Angeles County, California, seeking relief pursuant to the California Business and Professions Code §§ 16720 and 16750 (the "Cartwright Act").

Respondents removed the case to the district court under 28 U.S.C. § 1441, contending that the district court had jurisdiction under 28 U.S.C. §§ 1331 and 1332. Respondents claimed original jurisdiction pursuant to 28 U.S.C. §1331 on the ground that the Complaint raised allegations concerning action and agreements between the United States and foreign sovereign states; and pursuant to 28 U.S.C. §1332 based upon diversity of

citizenship, with the Petitioner being a citizen of California, and Respondents being organized under the laws of, and having their principal places of business in, states other than California.

I. The Memorandum Of Understanding And Actions Of Respondents

The Russian Federation initiated a meeting in October 1993 in Moscow to avert further import quotas on Russian aluminum following actions by the European Union placing such import quotas. Representatives of Australia, Canada, the European Union, Norway, the Russian Federation and the United States, met to address the excessive global supply of primary aluminum in October 1993 in Moscow, and again in December 1993 in Washington D.C.

In January 1994, a written Memorandum of Understanding (hereinafter "MOU") was negotiated and executed by the six primary aluminum producing nations. The terms of the MOU allowed the Russian Federation to reduce its annual aluminum exports for two years, the European Union to refrain from renewing import quotas on Russian aluminum, and for certain governments, including the United States, to create a fund to assist in the modernization of the Russian aluminum industry.

The countries participating in the MOU noted that commercial decisions by the aluminum industry, together with the Russian Federation reduction, were expected to facilitate the return of market conditions and decrease excessive aluminum supplies. The MOU did not require any government action by any country other than the Russian Federation with respect to the curtailment of production. Such action was not taken since such

curtailment would violate the United States antitrust laws.

Subsequent to the execution of the MOU, Respondents agreed amongst themselves, without approval or consent of the United States government, to cut back the production of primary aluminum in the United States. The price of primary aluminum in the United States rose from $.533 per pound in 1993 to $.650 in 1994, to $.93 per pound in the first quarter of January 1995 (through January 31st).

Petitioner, and all class members who purchased primary aluminum or aluminum products, contended that they were injured in that they paid almost double for such primary aluminum or aluminum products due to the activities of Respondents.

II. Proceedings Below

Following removal to district court, Respondents filed motions to dismiss the Complaint for failure to state a claim under Federal Rules of Civil Procedure, Rule 12(b)(6). Respondent Aluminum Association filed a motion to dismiss under Federal Rules of Civil Procedure, Rule 12(b)(2), for lack of personal jurisdiction.

The district court granted Respondent Aluminum Association's motion to dismiss for lack of personal jurisdiction. The district court ruled that Respondent Aluminum Association's contacts with California were irregular and attenuated and did not give rise to general jurisdiction. The district court also ruled that it did not have specific jurisdiction because Petitioner's claims did not satisfy the "but for" test in Ballard v. Savage, 65 F.3d 1495 (9th Cir. 1995). The district court found that Petitioner's claims

arose out of Respondent Aluminum Association's non-California activities, despite Petitioner's claim that "but for" Respondent Aluminum Association's contact with Respondents' California offices, Respondents would not have succeeded in accomplishing the price fix and curtailment of production.

The district court also converted Respondents' motion to dismiss into a motion for summary judgment.

The district court required Petitioner to present evidence sufficient to oppose a Motion for Summary Judgment under Rule 56(c), despite the lack of the opportunity to conduct discovery. The district court ruled that Petitioner's claims were nonjusticiable on the basis of the Political Question, Act of State Doctrine, and Noerr-Pennington Doctrines. The district court inferred from the Complaint that a domestic price fix was not feasible in light of the international, world-wide control of the amount of production of primary aluminum. The district court made this inference despite allegations in the Complaint which showed that the only "control" the signatories to the MOU exercised was an agreement with the Russian Federation to decrease Russian aluminum production and exports.

Having made inferences in favor of Respondents, the district court thereafter granted Respondents' motion for summary judgment and denied Petitioner's motion for reconsideration of the judgment.

The court of appeals affirmed the decision of the district court and denied a timely petition for a rehearing on May 14, 1998.

REASONS FOR GRANTING THE PETITION

I. The Court Of Appeals' Decision To Affirm The District Court's Dismissal On The Basis Of The Political Question Doctrine Is Incorrect And Conflicts With This Court's Decision In *Baker v. Carr*.

The district court dismissed this case on the basis of the Political Question Doctrine because Petitioner allegedly is "fundamentally challenging the conduct of the United States and foreign nations in the process and result of controlling the amount of production of primary aluminum on a world-wide basis." (App., *infra*, 13a)

This conclusion is wrong since the MOU specifically avoided this result.

In *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691 (1961), this court articulated six criteria, any of which will trigger the Political Question doctrine. These six criteria are set forth as follows at 369 U.S. at 217, 82 S.Ct at 710:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially discoverable and manageable standards; [3] the impossibility of deciding without an initial policy determination reserved for non-judicial discretion; [4] the impossibility of deciding without expressing lack of respect for the coordinate branches of government; [5] unusual need for adherence to a political decision already made; and [6] the potentiality for embarrassment from multifarious pronouncements by various departments.

None of the *Baker, supra*, criteria apply to the facts and issues of the instant case. As demonstrated by the Complaint, the violations of the Cartwright Act arise from the domestic price-fix organized and executed by Respondents, outside the context of the MOU.

The first *Baker, supra*, criterion is not triggered in the instant case since there is no textually demonstrable constitutional commitment of the issue to a coordinate branch of the government. The actions at issue are strictly limited to domestic price-fixing on the part of Respondents, an action specifically discouraged by the United States government.

Petitioner did not ask the lower courts to adjudicate the validity of the Executive's actions in negotiating or signing the MOU. Nor did Petitioner request the Court to interpret the MOU. Even if Petitioner had requested the Court to determine whether Respondents' domestic price-fixing agreement falls within the scope of "allowable conduct" under the MOU, such a request would be allowed. In *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 106 S.Ct. 2860 (1986), this court stated at 478 U.S. at 230, 106 S.Ct. at 2866, in relevant part, as follows:

> [C]ourts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and acceptable task for the federal courts.[1]

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[1] In *Japan Whaling, supra*, wildlife conservation groups brought an action for declaratory and injunctive relief alleging that Cabinet members breached a statutory duty with respect to

The second *Baker, supra*, criterion is inapplicable since the Cartwright Act provides judicially discoverable and manageable standards under which to decide the issues of this case. It is the role of the courts to interpret statutes. This court held in *Japan Whaling, supra*, 478 U.S. at 230, 106 S.Ct. at 2866, in relevant part, as follows:

> [U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.

The third criterion of *Baker, supra*, does not apply to the instant case since the Complaint alleges a non-compliance with the California antitrust laws. This non-compliance lies well within the district court's power to determine whether Respondents' conduct was legal. This court in *Baker, supra*, 369 U.S. at 211, 82 S.Ct. at 707, admonished against ". . . sweeping statements to the effect that all questions touching on foreign relations are political questions. . . " and stated ". . . it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." Thus, the lower courts should have exercised their judicial discretion to hear the issues of the matter at hand.

In *Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir. 1995) the Appellate Court addressed the last three *Baker, supra*, criteria at pages 249 and 250, stating in relevant part as follows:

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international whaling quotas.

> The fourth through sixth *Baker* factors appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests.

Accordingly, *Baker, supra*, criteria four through six do not apply to the instant facts which involve exclusively the actions of Respondents who instituted a domestic price-fix.

Under the fourth *Baker, supra*, criterion, resolution of this case by the courts does not threaten to show disrespect to the Executive. Review by the lower courts of the antitrust laws and even the MOU in their judicial function "no more involves a policy statement or expresses a lack of respect due to the executive than does any other question of statutory interpretation." *Population Institute v. McPherson*, 797 F.2d 1062, 1070 (D.C. Cir. 1986).[2]

The fifth *Baker, supra*, criterion does not apply to this case. Petitioner alleged that Respondents engaged in a domestic price-fixing scheme outside the negotiated and intended effect of the MOU. As such, Respondents are in violation of the Cartwright Act. Thus, there was not any unusual need for unquestioning adherence to the political decision made regarding the MOU.

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[2] In *Population Institute, supra*, the District Court held that a challenge to AID Administrators' determination of eligibility for AID funds under the Continuing Appropriations Act, 1985, did not constitute a non-justiciable political question.

The sixth *Baker, supra*, criterion does not apply to the instant case. A court decision would not be a potential "embarrassment" as a result of "multifarious pronouncements", since the Complaint does not call into question the Executive's actions. The Complaint challenged Respondents' acts of price-fixing in violation of the Cartwright Act. By deciding the case, the lower courts would have advanced the government's interest in a market unburdened by illegal price-fixing arrangements.

In summary, the Complaint did not involve any of the six factors set forth by this court in *Baker, supra*, for identifying "political questions."

II. The Court Of Appeals' Decision To Affirm The District Court's Dismissal On The Basis Of The Act Of State Doctrine Is Incorrect And Conflicts With This Court's Prior Precedents.

This court in *W.S. Kirkpatrick & Co., Inc., et al. v. Environmental Tectonics Corporation, International*, 493 U.S. 400, 110 S.Ct. 701 (1990), found the Act of State Doctrine is applicable only in limited situations. This court stated at 493 U.S. at 405, 110 S.Ct. at 704 as follows:

> In every case in which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory. [Emphasis added.]

The district court improperly concluded that the Act of State Doctrine is applicable to the instant case. The relief sought by Petitioner does not require the court to declare invalid an action of a foreign sovereign, taken within its own territory. Under the MOU, the only act taken by a foreign sovereign in its own territory is that of the Russian Federation. The Complaint does not challenge this act under the MOU. The Complaint challenges the acts of Respondents in the United States. These acts were not encompassed by the MOU, and were specifically rejected.

In *Kirkpatrick, supra*, this court did not find the Act of State Doctrine relevant in a case wherein plaintiff alleged that its competitor was awarded a contract by the Nigerian government after the competitor allegedly bribed Nigerian officials. This court stated at 493 U.S. at 406, 110 S.Ct. at 705 as follows:

> Act of state issues only arise when a court must decide - that is, when the outcome of the case turns upon - the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine. [Emphasis in original.]

This court concluded, at 493 U.S. at 409-410, 110 S.Ct. at 707, as follows:

> Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign

> governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid. That doctrine has no application to the present case because the validity of no foreign sovereign act is at issue." [Emphasis added.]

The court of appeals in *Northrop v. McDonnell Douglas Corp.*, 705 F.2d 1030 (9th Cir. 1983), followed this limited application of the Act of State Doctrine and held that the Act of State Doctrine does not shield all violations which involve a foreign sovereign. The court stated at pages 1048-1049 as follows:

> We decline to construe the act of state doctrine to shield all violators of private agreements that involve some foreign governmental act.
>
> * * * *
>
> As noted in *Timberlane*, the act of state doctrine "does not bestow a blank-check immunity upon all conduct blessed with some imprimatur of a foreign government."

The Court in *Northrop, supra*, further stated at page 1049, in footnote 26, that: "mere governmental approval or foreign governmental involvement which the defendants had arranged does not provide a defense."

The Act of State Doctrine has limited applicability and should not have been employed in the instant case. The Complaint does not require the district court to declare invalid the action of a foreign sovereign, performed within its own territory.

The Complaint only referred to the invitation by the Russian aluminum producers, through the Russian Federation's letter to Western producers, to cut production of aluminum in the Western producers' countries.

The court of appeal in *Grupo Protexa, S.A. v. All American Slip*, 20 F.3d 1224 (3d Cir. 1994), *cert. denied* in __ U.S. __, 115 S.Ct. 481 (1994), stated at page 1237 as follows:

> . . . the party invoking the act of state doctrine has the burden to prove its applicability . . . . In other words, the court must determine whether there is evidence of a potential institutional conflict between the judicial and political branches such that a judicial inquiry into the validity of a foreign state's actions could embarrass the political branches in their conduct of foreign affairs . . . This analysis 'must always be tempered by common sense' [Citations omitted]. . . . 'The less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.' [Citations omitted]." [Emphasis added][3]

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[3] The Court of Appeals held, at page 1238, on the act of state issue, as follows:

> "This litigation is between private parties for the sole purpose of resolving an insurance coverage dispute which, in turn, depends upon the construction and application of a single phrase in the policy. We see no reason for believing that a judicial inquiry into the validity of the Port Captain's order under Mexican law, in order to determine whether Protexa may recover wreck removal

Under the decision in *Grupo, supra*, the conduct by the Russian Federation alleged in the Complaint is insufficient to invoke the protection of the Act of State Doctrine.

Further, the Complaint's description of any action by a foreign sovereign on its own territory was limited to the Russian Federation cutting back its own production. The only activity of the Russian Federation beyond its own cut-backs was the statement inviting producers in other countries to cut back. As alleged in Petitioner's Further Material Facts, this invitation, however, was rejected by the United States Government and the other MOU signatories.

Respondents' activities of private price fixing did not, in any manner, reflect any decision of a foreign government taken within its own territory. Consequently, the district court was never required to adjudicate the validity of a foreign sovereign's actions. As such, the Act of State Doctrine is not a bar to the Complaint.

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costs, would hinder the conduct of foreign relations by the United States government. In any event, Protexa has not offered evidence suggesting that our rejection of the act of state doctrine would have that consequence, nor even a basis for believing that diplomatic difficulties could arise in the aftermath of this case." [Footnote omitted] [Emphasis added]

III. The Court of Appeals' Decision To Affirm The District Court's Dismissal On The Basis Of The Noerr-Pennington Doctrine Is Incorrect and Conflicts With This Court's Prior Precedents.

The Complaint's prosecution of Respondents for the U.S. domestic price-fix after the signing of the MOU was consistent with the United States Government's position against a domestic price-fix as set forth in the MOU and its Press Guidance Report. As such, the lower courts clearly erred when they found that the Complaint should be barred by the Noerr-Pennington Doctrine.

Noerr-Pennington immunizes private industry from anti-trust liability when private industry petitions the government for certain restraints or monopolies on trade. Respondents did not petition the United States government to restrain aluminum production in the United States and engage in a domestic price-fix. Thus, Noerr-Pennington immunity does not attach to Respondents in the instant case.

In *Allied Tube and Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S.Ct. 1931 (1988), this court ruled that Noerr-Pennington immunity attaches only when the anticompetitive conduct at issue constitutes a valid effort to petition the government. This court stated at 486 U.S. at 503, 108 S.Ct. at 1938, as follows:

> We cannot agree with petitioner's absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price

> agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. . . . Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action. . . We thus conclude that *Noerr* immunity of anticompetitive activity intended to influence the government depends not only on its impact, but also on the context and nature of the activity." [Emphasis added]

This court continued at 486 U.S. at 507-508, 108 S.Ct. at 1941, as follows:

> Just as the antitrust laws should not regulate political activities 'simply because those activities have a commercial impact,' [Citation omitted] so the antitrust laws should not necessarily immunize what are in essence commercial activities simply because they have a political impact. [Footnote omitted]

In the instant case, the damages suffered by the Petitioner and the class did not arise from purely governmental processes related to the MOU or its negotiation. The MOU did not establish the production cut backs alleged in the Complaint.

As such, under *Allied, supra*, Noerr-Pennington immunity does not apply and it was an error for the district court to grant summary judgment in favor of Respondents on such basis.

Allied, supra, was followed in *F.T.C. v. Superior Court Trial Lawyers Ass'n.*, 493 U.S. 411, 110 S.Ct. 768 (1990)[4] in which this court stated at 493 U.S. at 425, 110 S.Ct. at 768 as follows:

> Indeed, respondents' theory of *Noerr* was largely disposed of by our opinion in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988). We held that the *Noerr* doctrine does not extend to 'every concerted effort that is genuinely intended to influence governmental action.' 486 U.S., at 503, 108 S.Ct., at 1938. . . . [Emphasis added]

In the instant case, the actions of Respondents alleged in the Complaint and Petitioner's Further Material Facts were not those of soliciting the government to pass legislation, or even "advising" for a political end, but were in fact a commercial price fix.

However, assuming Respondents' actions as "informal advisors" to the U.S. government were to be considered protected, such protection would not extend to the activities of

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[4] *F.T.C., supra*, involved a boycott by lawyers in private practice who acted as court appointed counsel for indigent defendants in criminal cases in the District of Columbia which was aimed at forcing an increase in hourly compensation paid to them. The court held that the boycott constituted a horizontal arrangement among competitors that was a naked restraint of trade and not protected under the Noerr-Pennington Doctrine.

Respondents after the signing of the MOU when they engaged in their production cut backs pursuant to the agreement, combination conspiracy, and concert of action alleged in the Complaint and the Further Statement of Material Facts.

Respondents' action in advising the United States Government only consisted of a resolution by the Aluminum Association to control the production and exports of aluminum by the C.I.S. countries.

This conduct in the first instance is not qualified under the solicitation of the government criterion of Noerr-Pennington since Respondents did not solicit the government for approval of a U.S. domestic price-fix. However, even if they had, such conduct would have been considered to be a sham under *Allied, supra*, in which this court stated at 486 U.S. at 500, 108 S.Ct. at 1937, footnote 4, as follows:

> Of course, in whatever forum, private action that is not genuinely aimed at procuring favorable government action is a mere sham that cannot be deemed a valid effort to influence government action. *Noerr*, 365 U.S., at 144, 81 S.Ct., at 533; *California Motor Transport*, 404 U.S., at 511, 92 S.Ct., at 612.

Further, Respondents' actions as self-proclaimed "advisors" to the United States Government, and their admitted presence at the MOU meetings while not being official delegates or participants, does not create any immunity under Noerr-Pennington since these actions were "not genuinely aimed at

procuring favorable government action."[5] Respondents herein engaged in a private U.S. domestic price-fix.

For the above reasons, the Noerr-Pennington Doctrine should not have immunized Respondents' conduct.

IV. The Court Of Appeals' Decision To Affirm The District Court's Dismissal Of the Aluminum Association For Lack of Personal Jurisdiction Is Incorrect.

In *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (9th Cir. 1990)[6], rev'd, 499 U.S. 585, 111 S.Ct. 1522 (1991), the court of appeals stated, at page 381, the Ninth Circuit's three-prong test to determine whether the exercise of specific jurisdiction would comport with due process as follows:

> (1) The defendant must have done some act by which he purposefully avails himself of the

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[5] *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380, 111 S.Ct. 1344, 1354 (1991), quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500, n. 4, 108 S.Ct. 1931, 1937, n. 4 (1988).

[6] In *Shute, supra*, a cruise ship passenger brought suit against defendant seeking damages for injuries sustained in a slip and fall incident. The Court of Appeals held that the defendant's contact with the State of Washington was insufficient to support an exercise of general jurisdiction but was sufficient to establish specific jurisdiction. The Court of Appeals also held that the forum-selection provision was unreasonable and unenforceable.

> privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must arise out of the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable. [Citation omitted.]

In determining whether a claim "arises out" of the defendant's forum-related activities, the court of appeals explicitly adopted the "but for" test when it stated the following at page 385: "Our circuit, in *Cubbage v. Merchent*, implicitly adopted the 'but for' test in analyzing whether a cause of action arises from a defendant's continuing efforts to solicit business in the forum state. Today, we make its adoption explicit."

However, this court granted certiorari and reversed the court of appeals' decision on the basis that the forum-selection clause contained in the tickets was enforceable. In addition, this court stated the following at page 589:

> We granted certiorari to address the question whether the court of appeals was correct in holding that the District Court should hear respondents' tort claim against petitioner. [Citation omitted.] Because we find the forum-selection clause to be dispositive of this question, we need not consider petitioner's constitutional argument as to personal jurisdiction. [Citations omitted.]

The fact that this court reversed *Shute, supra*, but did not address the personal jurisdiction issue has left the applicability of the "but for" test in the Ninth Circuit questionable. This concern is expressed in *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52

F.3d 267 (9th Cir. 1995)[7], when the court of appeals stated the following at pages 271-272:

> We have said that a claim arises out of the forum-related activities if it would not have happened but for the forum-related activities. [Citation omitted.] The authority of our decision in *Shute* is questionable. The Supreme Court reversed our decision in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991). The Supreme Court did not reach the issue of whether the "but for" test was appropriate in *Carnival Cruise Lines*. But neither did the Court expressly note that the jurisdiction issue was not before it [citation omitted], or limit its grant of certiorari to a separable issue. Because of the posture of the Court's reversal of *Shute*, it is not clear whether the "but for" test survives.

In the instant case, the district court held, and the court of appeals affirmed, that the courts did not have specific jurisdiction

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[7] In *Omeluk, supra,* a seaman, who was injured when a grate on the deck of a fishing vessel gave way and he fell overboard, brought a suit against the Norwegian ship rebuilder. The Court of Appeals held that there was no general jurisdiction over the defendant because it did not have regular contact with the State of Washington. Moreover, there was no specific jurisdiction because the defendant did not purposefully avail itself of the privilege of conducting activities in Washington nor did the claim arise out of the forum-related activities.

over Respondent Aluminum Association because "Plaintiff has offered no evidence to show that his claims would not have arisen but for The Aluminum Association's contacts with California." [Emphasis added.] (App., *infra*, 4a, 20a).

If this court holds that the "but for" test is no longer the applicable test in determining specific jurisdiction, then the district court and the court of appeals in the instant case have erred in applying and relying upon the test to find that they do not have specific jurisdiction over Respondent Aluminum Association.

If the "but for" test is valid, then the district court and the court of appeals have still erred in holding that Petitioner has failed to meet the test. But for Respondent Aluminum Association's contacts with Respondent Kaiser and other Respondents with California offices, Respondent Aluminum Association and its alleged co-conspirators would not have succeeded in accomplishing the price-fix. But for Respondent Kaiser and other Respondents with California offices reducing their production, there would not have been a violation of the Cartwright Act. But for Respondent Aluminum Association's telephone calls, correspondence, and personal meetings in California, a domestic price fix could not have succeeded and Petitioner would not have suffered harm.

In order to resolve the confusion in the Ninth Circuit, it is important for this court to address the applicability and validity of the "but for" test as it applies to specific jurisdiction cases, such as the instant case.

V. The Court Of Appeals' Decision To Affirm The District Court's Conversion Of A Motion To Dismiss To A Motion for Summary Judgment Is Incorrect and Conflicts With This Court's Prior Precedents.

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986).

In *Timberlane Lbr. Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976), *cert. denied* 472 U.S. 1032, 105 S.Ct. 3514 (1985), the court of appeals considered whether the court appropriately converted a motion to dismiss to a motion for summary judgment as grounds for dismissal of an antitrust case. The Court ruled that summary disposition of complex antitrust cases without allowing for adequate discovery was inappropriate. The Court stated at pages 602-603 as follows:

> Nevertheless, we note that the Supreme Court has expressed disapproval of summary disposition in this type of case:
>
> > We believe that summary procedures should be used sparingly in complex antitrust litigation where motives and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can

> be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice."
> *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962). Putting Plaintiffs to the test in such cases without ample opportunity for discovery is particularly disfavored. *Hospital Building Co. v. Trustees of Rex Hospital, supra* 425 U.S. at 746, 96 S.Ct. 1848 (1976). From our review of the allegations and affidavits of both sides, it is clear to us that the factual circumstances here involved are indeed complicated. Therefore, in spite of the nonmandatory nature of Rule 56(e), we do not feel that it was proper to dismiss the instant complaint without affording Plaintiffs an opportunity for full discovery. [Emphasis added.]

It was improper to dismiss the instant Complaint without affording Petitioner the opportunity to conduct full discovery. Petitioner's first set of discovery, propounded on March 25, 1996, was held in abeyance until after the district court's decision on the motion to dismiss. The district court noted such fact in its decision when it stated at page 5 of its decision (App., *infra*, 14a) that:

> The Court has deemed to be true all of the facts alleged by Plaintiff in this Complaint. Accordingly, Plaintiff does not need discovery to support his allegations. Therefore, Plaintiff's motion for continuance is denied.

The present case involves complex antitrust issues in which evidence is largely in the hands of Respondents. As this court stated in *Poller, supra*, trial of a complex matter through the affidavits is inappropriate. Further, the district court compounded its error when it dismissed the case without affording Petitioner the opportunity to conduct any discovery. As this court stated in *Hospital Building Co., supra*, such action by the district court is particularly disfavored.

Courts in other districts have followed the court's rationale in *Timberlane*. In *Brennan v. National Telephone Directory Corp.*, 850 F.Supp. 331 (E.D.Pa. 1994) the court discussed whether it was appropriate to convert a motion to dismiss into a motion for summary judgment in an employment discrimination and wrongful discharge case. The court stated at page 355 as follows:

> Whether or not to treat the motion as a motion for summary judgment by considering the outside materials attached thereto is a matter of discretion for the court. *Wiley v. Hughes Capital Corp.*, 746 F.Supp. 1264, 1275 (D.N.J. 1990); *Kelley ex. rel. Michigan NRC v. Arco Indus.*, 721 F.Supp. 873, 877 (W.D. Mich. 1989). However, courts have held that exercise of the court's discretion is not warranted where there has been little or no discovery conducted by the parties. *Brug v. The Enstar Group, Inc.*, 755 F.Supp. 1247, 1251 (D.Del. 1991); *Ospina v. Dept. of Corrections*, 749 F.Supp. 572, 574 (D.Del. 1990); *Kelley*, 721 F.Supp. at 877-78. Considering the motion as a motion for summary judgment would be improper

> in those situations because the parties may not be able to present enough materials to support or oppose a motion for summary judgment since no factual record has yet been developed." *Ospina*, 745 F.Supp. at 574 (citing *Melo v. Hafer*, 912 F.2d 628, 634 (3rd Cir. 1990), *aff'd*, 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991)." [Emphasis added.]

The discovery which was already served and held in abeyance in the instant case would have demonstrated that the defenses of the Political Question Doctrine, the Act of State Doctrine, and the Noerr-Pennington Doctrine do not provide exemptions to the Respondents' price-fixing conduct. Such discovery would have demonstrated that Respondents engaged in a United States domestic price-fix, which is a per se violation of the Cartwright Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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BEST AVAILA

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN HAMMONS, an individual, dba FULL CIRCLE DISTRIBUTING, a sole proprietorship, Plaintiff-Appellant, v. ALCAN ALUMINUM CORP., a Delaware corporation; ALUMINUM COMPANY OF AMERICA, a Pennsylvania corporation; ALUMEX INC., a Delaware corporation; KAISER ALUMINUM CORPORATION, a Delaware corporation; REYNOLDS METALS CO., a Delaware corporation; ALUMINUM ASSOCIATES, a Delaware corporation, Defendants-Appellees.	No. 96-56163 D.C. No. CV-96-00319-LHM ORDER

BLE COPY

BEFORE: HALL, BRUNETTI, and RYMER, Circuit Judges

Appellant's Petition for Rehearing En Banc filed December 24, 1997, is construed as a petition for rehearing with a suggestion for rehearing en banc.

The panel has voted to deny appellant's petition for rehearing. Judges Brunetti and Rymer have voted to reject the suggestion for rehearing en banc, and Judge Hall so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN HAMMONS, an individual, dba FULL CIRCLE DISTRIBUTING, a sole proprietorship, Plaintiff-Appellant, v. ALCAN ALUMINUM CORP., a Delaware corporation; ALUMINUM COMPANY OF AMERICA, a Pennsylvania corporation; ALUMEX INC., a Delaware corporation; KAISER ALUMINUM CORPORATION, a Delaware corporation; REYNOLDS METALS CO., a Delaware corporation; ALUMINUM ASSOCIATES, a Delaware corporation, Defendants-Appellees.	No. 96-56163 D.C. No. CV-96-00319-LHM ORDER*

Appeal from the United States District Court
for the Central District of California
Linda H. McLaughlin, District Judge, Presiding

Argued and Submitted December 3, 1997
Pasadena, California

BEFORE: HALL, BRUNETTI, and RYMER, Circuit Judges

We affirm for the reasons given by the district court.

The motion for judicial notice is denied.

The decision is AFFIRMED.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case. No. SA CV 96 - 319 - LHM (EEx) Date: 7/12/96

Title Hammons v. Alcan Aluminum, et al.

DOCKET ENTRY

PRESENT:

HON. Linda H. McLaughlin, Judge

Debra Beard, Deputy Clerk None Present
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
None Present

ATTORNEYS PRESENT FOR DEFENDANTS:
None Present

PROCEEDINGS: PLAINTIFF'S MOTION FOR RECONSIDERATION

(1) The Court has read and consider Plaintiff's Motion for Reconsideration etc and Defendants' Opposition.

(2) Upon review and reconsideration, the Court confirms its ruling and order granting summary judgment in favor of Defendants. The Court adopts all of the reasons set forth in Defendants' Opposition to the Motion for Reconsideration in support hereof.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case. No. SA CV 96 - 319 - LHM (EEx) Date: 7/1/96

Title Hammons v. Alcan Aluminum, et al.

DOCKET ENTRY

PRESENT:

HON. Linda H. McLaughlin, Judge

Debra Beard, Deputy Clerk — None Present
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
None Present

ATTORNEYS PRESENT FOR DEFENDANTS:
None Present

PROCEEDINGS: MOTION FOR SUMMARY JUDGMENT

IN CHAMBERS:

(1) The Court has read and considered defendants' motion for summary judgment, plaintiff's opposition, and defendants' reply.

(2) **Standard of Review.** Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of showing "that there is an absence of evidence to support the nonmoving party's case." Celotex Corp v. Catrett, 477 U.S. 317, 325 (1986). The nonmoving party must "designate 'specific facts showing that there is a genuine issue for trial.'" Id., at 324 (quoting Fed. R. Civ. P. 56(e)). The evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

(3) **Procedural Background:** Plaintiff filed his complaint in Los Angeles Superior Court seeking relief under California Business & Professions Code Secs. 16720 etc (the "Cartwright Act"). Defendants removed the case to federal court and filed a motion to dismiss. After reading and considering Defendants' Motion to Dismiss, Plaintiff's Opposition and Defendants' Reply, the Court converted Defendants' Motion to a Motion for Summary Judgment under Rule 12(b)(6) and requested further briefing so that all parties would be given reasonable opportunity to present all material pertinent to the motion.

(4) **Evidence:** The Court receives into evidence Plaintiff's verified complaint including all exhibits thereto,

Plaintiff's Statement of Further Material Facts, the materials obtained under the Freedom of Information Act submitted under Mr. Fine's Declaration, and the public records and letters submitted under Ms. Lockwood's Declaration and of which the Court takes judicial notice.

Accordingly, for purpose of Defendants; Motion for Summary Judgment, all of the allegations in Plaintiff's complaint are deemed to be the true facts as to which the Court applies the law.

(5) **Controlling Facts:** Plaintiff's "Summary of Complaint" states the following facts:

"1. This Complaint challenges as illegal under Secs. 16720 and 16750 of the California Business and Professions Code, commonly known as the Cartwright Act, the actions of Defendants and their co-conspirators in creating and implementing an agreement, combination and conspiracy and concert of action amongst themselves in conjunction with a Memorandum of Understanding entered into by the Russian Federation, Canada, and the United States to restrict the production of primary aluminum causing consequent rises in prices for primary aluminum and aluminum products in the State of California and the United States."

The "Co-conspirators" as alleged by Plaintiff are:

"18. Various nations (including the Government of the Russian Federation), individuals, partnerships, corporations, companies and associations, including subsidiaries and affiliates of Defendants and other manufacturers of aluminum not named as a Defendant in this Complaint, have participated as co-conspirators in the violations alleged herein and have

performed acts and made statements in furtherance thereof."

Plaintiff shows by facts deemed to be true for this motion that Defendants and co-conspirators controlled the amount of production of primary aluminum through the Memorandum of Understanding ("MOU") and engaged in a world-wide price fixing conspiracy, to wit:

"37. Beginning at least as early as 1993 ... the Defendants and co-conspirators engaged in an unlawful agreement, combination and conspiracy, and concert of action in unreasonable restraint of trade and commerce in violation of ... the Cartwright Act.

"38. The aforementioned agreement, combination and conspiracy, and concert of action consisted of a continuing agreement, understanding and concert of action among each Defendant and co-conspirator, the substantial terms of which were:

(a) to reduce the amount of primary aluminum each of them produced;

(b) to reduce the amount of primary aluminum produced among U.S. producers as part of the reduction of primary aluminum produced by "Western producers";

(c) to raise, stabilize and maintain the price of primary aluminum and aluminum products produced by the Defendants and co-conspirators, through the State of California, United States and the World."

Thus, Plaintiff shows by facts deemed to be true for this motion that the Defendants and co-conspirators were joined in a single, world-wide course of action to control the amount of production of primary aluminum on an

international basis.

(6) **World-Wide Price Fixing Conspiracy:** The applicable law is set forth under the Political Question Doctrine; the Act of State Doctrine; and the Noerr-Pennington Doctrine.

Under the Political Question Doctrine, the judiciary must refrain from adjudicating political questions. U.S. v. Mandel, 914 F.2d 1215 (9th Cir. 1990). "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative -- the 'political' -- departments of the Government, the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." Oetjen v. Central Leather Co., 246 U.S. 297 (1918). Consequently, cases that challenge the conduct of the Executive Branch in the foreign policy area are dismissed as non-justiciable. Dole v. Carter, 569 F.2d 1109 (10th Cir. 1977). In particular, challenges to the substance of a trade agreement (Sneaker Circus, Inc. v. Carter, 566 F.2d 396 (2d Cir. 1977) and to the grant of foreign aid (Dickson v. Ford, 521 F.2d 234 (5th Cir. 1975; cert. denied, 424 U.S. 954) are non-justiciable on the basis of the Political Question Doctrine.

Under the Act of State Doctrine, the United States courts will not sit in judgment of the severeign [sic] acts of other nations. Underhill v. Hernandez, 168 U.S. 250 (1897). The Act of State Doctrine precludes adjudication of claims which challenge "the effect of official action by a foreign sovereign." W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400 (1990). The Act of State Doctrine's principle "that the conduct of

one independent government cannot be successfully questioned in the courts of another ... rests at last upon the highest considerations of international comity and expediency." Oetjen v. Central Leather Co., 246 U.S. at 303-04. The Act of State Doctrine requires abstention where passing on the validity of foreign sovereign acts may hinder the United States and its Executive in its relations with foreign states. Kirkpatrick, 493 U.S. at 404. The Act of State Doctrine can be raised as a defense even if the sovereign is not joined as a party. International Ass's of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354 (9th Cir. 1981).

Finally, the Noerr-Penningtgon Doctrine specifically inculcates from antitrust liability petitioning activities at all levels and branches of government, including the Executive Branch. Eastern R.R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965). "Joint efforts to influence public officials do not violate the antitrust laws, even if intended to eliminate competition." Pennington, 381 U.S. at 670. The Noerr-Pennington Doctrine is equally applicable to actions under the Cartwright Act.
Blank v. Kirwan, 39 Cal. 3d 311 (1985). Private parties cannot be held liable for petitioning -- or even "conspiring with" -- the United States Government because there is no conspiracy exception to Noerr-Pennington immunity. City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365 (1991). Similarly, private parties cannot be held liable for restraints imposed or negotiated by the Government. Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 17 F.3d 295, cert. den. 115 S. Ct. 66.

Based on Plaintiff's facts which are deemed to be true for this motion, and applying the above law, the Court concludes: (i) Because Plaintiff is fundamentally challenging the conduct of the United States and foreign nations in the process and result of controlling the amount of production of primary aluminum on a world-wide basis, the Political Question Doctrine requires dismissal of Plaintiff's complaint as a matter of law; (ii) Because Plaintiff challenges the validity of the acts of the Russian Federation, together with the acts of co-conspirator, nations, including the signatories of the MOU, Plaintiff inseparably intertwines the validity of foreign sovereign acts into his claims and, accordingly, the Act of State Doctrine requires dismissal of Plaintiff's complaint as a matter of law; (iii) Because the Defendants' conduct is immunized from liability under the Noerr-Pennington Doctrine, Plaintiff's complaint is dismissed as a matter of law.

(7) **Purported Domestic Price Fix:** Plaintiff argues that his facts deemed to be true for this motion show that the Defendants engaged in a domestic price fix in the United States without any foreign government compulsion (pg. 2 of Plaintiff's "Statement of Further Material Facts").

Defendants' Motion for Summary Judgment demonstrated the absence of any real issue of fact regarding the existence of a conspiracy to establish a domestic price fix because Plaintiff's complaint is void of any such facts. Plaintiff's complaint shows that the production of primary aluminum was determined and controlled by the Defendants and co-conspirators on a

world-wide, **not domestic**, basis. Indeed, based on Plaintiff's facts, it is logically inferrible that a domestic price fix would be unfeasible in light of the international, world-wide control of the amount of production or primary aluminum by the parties to the MOU.

Accordingly, the buren on the motion shifted to Plaintiff; and Plaintiff failed to set forth any specific fact or issue of fact whatsoever to show the existence of a separate, domestic price fix, or even a domestic price significantly different than [sic] the world price.

Plaintiff offers one fact, which the Court deems to be true, to show a domestic price fix, to wit: the Defendant-domestic producers reduced their production of primary aluminum. Plaintiff offers no additional facts. Therefore, in the absence of any additional facts and evidence, the fact that domestic producers reduced their rate of production - standing alone - is insufficient to raise a triable issue of fact that a domestic price fix and/or damages were the resulting consequence caused by such reduced rate of production.

(8) **No Continuance:** The Court has deemed to be true all of the facts alleged by Plaintiff in his complaint. Accordingly, Plaintiff does not need discovery to support his allegations. Therefore, Plaintiff's motion for continuance is denied.

(9) **In Sum:** The Court deems to be true for this motion all of the facts alleged by Plaintiff in his verified complaint. As to a world-wide price fixing conspiracy, the Court determines that Plaintiff's claims are not justiciable in federal court under the Political Question, Act of State

Doctrine, and Noerr-Pennington Doctrines. As to a purported domestic price fixing conspiracy, the Court determines that Plaintiff has failed to raise any genuine issue of material fact that Defendants were engaged in a domestic price fix and, indeed, the logical inference from Plaintiff's facts is the opposite.

(10) **RULING:** The Court grants Defendants' Motion for Summary Judgment. Formal Order accompanies this minute order.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case. No. SA CV 96 - 319 - LHM (EEx) Date: 5/28/96

Title Hammons v. Alcan Aluminum, et al.

DOCKET ENTRY

PRESENT:

HON. Linda H. McLaughlin, Judge

Debra Beard, Deputy Clerk None Present
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
None Present

ATTORNEYS PRESENT FOR DEFENDANTS:
None Present

PROCEEDINGS: MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION
IN CHAMBERS:

The Court has read and considered defendant The Aluminum Association's motion to dismiss for lack of personal jurisdiction, plaintiff's opposition, and defendant's reply. Pursuant to Fed. R. Civ. P. 78 and Local Rule 7.11, based on the papers submitted by the parties and applicable law, the Court now rules as follows:

RULING: For the reasons discussed below, The Aluminum Association's motion to dismiss for lack of personal jurisdiction is GRANTED.

(1) **Standard of Review.** In considering a motion to dismiss, all factual allegations in the complaint must be accepted as true and all inferences therefrom must be drawn in the light most favorable to the plaintiff, dismissal is unwarranted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle [the plaintiff] to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Miller v. Glen & Helen Aircraft, Inc., 777 F.2d 496, 498 (9th Cir. 1985).

(2) **Burden of Proof.** The plaintiff has the burden to establish jurisdiction. Ziegler v. Indian River County, 64 F.3d 470, 473 (9th Cir. 1995). "When a district court acts on a defendant's motion to dismiss under Rule 12(b) (2) without holding an evidentiary hearing, the plaintiff need make only a prima facie showing of jurisdictional facts to withstand the motion to dismiss."

(3) **General Jurisdiction.** General jurisdiction exists "if the nonresident's contacts with the forum are continuous and systematic, and the exercise of jurisdiction

satisfied 'traditional notions of fair play and substantial justice.' Ziegler, 64 F.3d at 473 (quoting Reebok Int.'l LTD. v. McLaughlin, 49 F.3d 1387, 1391 (9th Cir. 1995)). The level of contact with California necessary to establish general jurisdiction is quite high. Shute v. Carnival Cruise Lines, 897 F.2d 377, 380 (9th Cir. 1988), rev'd on other grounds, 499 U.S. 585 (1990).

The evidence shows that the District of Columbia is defendant's principal place of business and place of incorporation (Williams Decl., ¶¶ 2, 3), defendant does not produce, manufacture, or sell aluminum (id. at ¶ 11), and that Defendant is not registered to do business in California; maintains no offices, records, telephone directory listing, or mailing address in California; does not own property in California; does not file tax returns in California; and has not designated an agent for service of process in California. Id., at ¶¶ 3-5, 10, 13, 15; see Hirsch v. Blue Cross, Blue Shield of Kansas City, 800 F.2d 1474, 1474, 1478 (9th Cir. 1986); Shute, 897 F.2d at 381. Furthermore, defendant maintains no bank accounts in California, has only three certificates of deposit in California (ie., at ¶ 14), and has sponsored or co-sponsored only four meetings in California, the last of which took place on 11/17/94. Id., at ¶ 14. Finally, Provident Nat. Bank v. Cal. Fed. Sav. & Loan Ass'n, 819 F.2d 434 (3rd Cir. 1987), cited by plaintiff, is distinguishable, for defendant in the instant case has no daily contact with California (see id., at 438), and plaintiff has presented no evidence to show that defendant's certificates of deposit, for example, are a continuous systematic part of defendant's business. See id.

Based on the evidence presented, defendant's California contacts are irregular and attenuated, and they do not rise to the level of contact necessary to establish general jurisdiction. See Shute, 897 F.2d at 380. In sum, plaintiff has failed to meet his burden of presenting facts to show that defendant's contacts are continuous and systematic.

Accordingly, this court has no general jurisdiction over The Aluminum Association.

(4) **Specific Jurisdiction.** "An exercise of specific '[j]urisdiction must comport with the state long-arm statute, and with the constitutional requirement of due process.'" Ziegler, 64 F.3d at 473 (quoting Omeluk v. Langsten Slip & Batbyggeri A/S, 52 F.3d 267, 269 (9th Cir. 1995). "California's long-arm statute extends jurisdiction to the limits imposed by the Due Process Clause." Id.,; see Cal. Civ. Pro. Code § 410.10. Thus, the question is whether exercising jurisdiction over the defendant would offend due process. See id.

To sustain his burden of establishing that the exercise of specific jurisdiction comports with due process, plaintiff must show that: (1) the defendant purposefully availed itself of the privilege of conducting activities in California, thereby invoking the benefits and protection of its laws; (2) plaintiff's claim arises out of the defendant's California-related activities; and (3) the exercise of jurisdiction would be reasonable. Id.; Terracom v. Valley Nat. Bank, 49 F.3d 555 (9th Cir. 1995).

(5) **Plaintiff's Claims Do Not Arise Out of**

Defendant's California Activities. A "but for" test is used to determine whether plaintiff's claims arise out of California-related activities. Ballard, 65 F.3d at 1500; Ziegler, 64 F.3d at 474. Here, the question is: but for defendant's contacts with California, would plaintiff's claims against the defendant have arisen? See Ballard, 65 F.3d at 1500.

Plaintiff's position is that "'[b]ut for' the Association's contacts with Kaiser and the other Defendants with California offices, the Association and its alleged co-conspirators would not have succeeded in accomplishing the price-fix. 'But for' Kaiser and the other Defendants with California offices reducing their production, there would not have been a violation of the Cartwright Act." Opposition, 14. However, plaintiff can establish that his claims arise out of The Aluminum Association's California activities only if he shows that his claims would not have arisen but for defendant's contacts with California. A showing that plaintiff's claims would not have arisen but for The Aluminum Association's contacts with corporations that have California offices is insufficient to establish specific jurisdiction.

Plaintiff has offered no evidence to show that his claims would not have arisen but for The Aluminum Association's contacts with California. On the contrary, the evidence shows that plaintiff's claims against The Aluminum Association could have arisen in the absence of The Aluminum Association's California activities. First, according to the plaintiff, The Aluminum Association's California activities included soliciting memberships, collection of dues from California members, etc.

Plaintiff's claims do not arise out of these activities, but from The American Association's involvement in the alleged conspiracy re: price fixing while it was acting as an advisor to the United States during intergovernmental meetings that were never held in California. See Complaint, ¶¶ 39(a) & (b), 41, 53. Such a conspiracy could have been formed regardless of whether The American Association has any contacts in California and regardless of whether the co-defendants had offices in California.[8]

In sum, plaintiff's claims against The American Association arise out solely of The Aluminum Association's non-California activities. Accordingly, this court has no specific jurisdiction over The Aluminum Association.[9]

---

[8]According to the complaint, Kaiser is incorporated in Delaware and has its principal place of business in Texas (Complaint, ¶ 14); Alumax is incorporated in Delaware and has its principal place of business in Georgia (id., at ¶ 13); Reynolds is incorporated in Delaware and has its principal place of business in Virginia (id., at ¶ 15; Pennsylvania is Alcoa's principal place of business and state of incorporation (id., ¶ 11); and Alancorp os incorporated in Delaware and has its principal place of business in Ohio (id., ¶ 11). Plaintiff has presented no evidence to suggest that The Aluminum Association's alleged conspiracy with such corporations is based on its California contacts.

[9]Having determined that plaintiff has failed to meet the "but for" test, the Court does not reach the first and third factors. See Part II, ¶ 4 above.

APPENDIX F

California Business and Professions Code Section 16720

§ 16720. Trust.

A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

(a) To create or carry out restrictions in trade or commerce.

(b) To limit or reduce the production, or increase the price of merchandise or of any commodity.

(c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

(d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.

(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following:

(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use,

merchandise, commerce or consumption below a common standard figure, or fixed value.

(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.

(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers of consumers in the sale or transportation of any such article or commodity.

(4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.

California Business and Professions Code Section 16750

§ 16750. Civil action; venue; damages; injunctive relief; attorney fee; costs

(a) Any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefor in any court having jurisdiction in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover three times the damages sustained by him or her, interest on his or her actual damages pursuant to Section 16761, and preliminary or permanent injunctive relief when and under the same conditions and principles as injunctive relief is granted by courts generally under the laws of this state and the rules governing these proceedings, and shall be awarded a reasonable attorneys' fee together with the costs of the suit.

This action may be brought by any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter; regardless of whether such injured person dealt directly or indirectly with the defendant.

The amendments to this section adopted at the 1959 Regular Session of the Legislature do not apply to any action commenced prior to September 18, 1959.

(b) The state and any of its political subdivisions and public agencies shall be deemed a person within the meaning of this section.

(c) The Attorney General may bring an action on behalf of the state or of any of its political subdivisions or public agencies to recover the damages provided for by this section, or by any comparable provision of federal law, provided that the Attorney General shall notify in writing any political subdivision or public agency of his or her intention to bring any such action on its behalf, and at any time within 30 days thereafter, such political subdivision or public agency may, by formal resolution of its governing body or as otherwise specifically provided by applicable law, withdraw the authority of the Attorney General to bring the intended action. In any action brought pursuant to this section on behalf of any political subdivision or public agency of the state, the state shall retain for deposit in the Attorney General antitrust account within the General Fund, out of the proceeds, if any, resulting from such action, an amount equal to the expense incurred by the Attorney General in the investigation and prosecution of such action or an amount equal to 10 percent of the total recovery obtained by the Attorney General, whichever is greater.

(d) In any antitrust action brought on behalf of the state in which the Attorney General is the class representative of political subdivisions, public agencies, or citizens of the state who have been affected by the matters set forth in the complaint, the state shall retain for deposit in the Attorney General antitrust account within the General Fund, the proceeds, if any, of any attorneys' fees awarded by the court in which such case is located, to the Attorney General, resulting from such class representation.

(e) In any action brought by the Attorney General pursuant to either state or federal antitrust laws for the recovery

of damages by the state or any of its political subdivisions or public agencies, in addition to his or her other powers and authority, the Attorney General may enter into contracts relating to the investigation and the prosecution of such action with any other party plaintiff who has brought a similar action for the recovery of damages and with whom the Attorney General finds it advantageous to act jointly, or to share common expenses or to cooperate in any manner relative to such action. In any such action, notwithstanding the provisions of Section 12520 of the Government Code, the Attorney General may undertake, among other things, either to render legal services as special counsel, or to obtain the legal services of special counsel from any department or agency of the Unites States, of this state of any other state or any department or agency thereof, any county, city, public corporation or public district of this state or of any other state, that has brought or intends to bring a similar action for the recovery of damages, or their duly authorized legal representatives in such action. The Attorney General may also enter into any agreement authorized by Chapter 5 (commencing with Section 6500) of Division 7 of Title 1 of the Government Code with any governmental entity enumerated in this subdivision, notwithstanding any provision to the contrary contained in Section 6500 of the Government Code. Every contract or agreement entered into pursuant to this subdivision (e) shall be approved by the Department of General Services.

(f) The amounts paid into the Attorney General antitrust account within the General Fund pursuant to subdivisions (c), (d) and (e) arising from the same action or companion actions shall not cumulatively exceed the greater of ten percent (10%) of the total recovery in all actions resulting from the Attorney General's representation or an amount equal to the expenses

incurred by the Attorney General in the investigation and prosecution of such actions. Any excess shall be paid into the General Fund.

(g) The district attorney of any county may prosecute any action on behalf of such county or any city or public agency or political subdivision located wholly within such county which the Attorney General is authorized to bring pursuant to subdivision (c) of this section, whenever it appears that the activities giving rise to such prosecution or the effects of such activities occur primarily within such county. The district attorney shall file with the Attorney General at least 30 days prior to the filing of any such action a copy of the proposed complaint together with a confidential memorandum and report explaining the facts giving rise to the proposed prosecution and supporting the filing of the new complaint. Prior to entering into any stipulated or consent judgment or other settlement of any such action, the district attorney shall file with the Attorney General at least 30 days prior to the execution thereof a copy of the proposed settlement together with a memorandum of explanation of the settlement. The Attorney General may waive any time requirements provided in this subdivision. In any investigation or action undertaken or brought by a district attorney pursuant to this section, if the Attorney General deems it necessary and in the public interest, the Attorney General may take full charge of any such investigation or prosecution, and the Attorney General shall have all the powers granted by Section 12550 of the Government Code in respect thereto.

(h) In any action prosecuted pursuant to the provisions of subdivision (g) a district attorney may exercise all of the powers conferred on the Attorney General by subdivision (e)

provided that every contract or agreement entered into pursuant to this subdivision by a district attorney shall first be approved by the governing authority of the agency in his or her county.

(i) In any action brought pursuant to subdivision (g) a district attorney may represent any political subdivision located within his or her county directly, in which case he or she shall notify in writing such political subdivision of his or her intention to bring any such action on its behalf, and at any time within 30 days thereafter, that political subdivision may, by formal resolution of its governing body or as otherwise specifically provided by applicable law, withdraw the authority of the district attorney to bring the intended action. In any action in which a district attorney directly represents any political subdivision located within his county, the district attorney shall retain out of the proceeds, if any, resulting from such action, an amount equal to the expense incurred by the district attorney in the investigation and prosecution of such action or an amount equal to 10 percent of the total recovery obtained by the district attorney, whichever is greater. In any action brought pursuant to subdivision (g) in which the county, through the district attorney, is the class representative of political subdivisions located within such county, the district attorney shall retain the proceeds, if any, of any attorneys' fees awarded by the court in which such action is pending to the district attorney, resulting from such class representation. All proceeds retained by a district attorney pursuant to this subdivision shall be deposited in the appropriate account as provided by law.

(j) Nothing in this section shall be construed to authorize any district attorney to exercise the powers conferred upon the Attorney General by an act of Congress of September

30, 1976, (P.L. 94-905; 90 Stat.1983) also known as the Hart-Scott-Rodino Antitrust Improvements Act of 1976, except at the direction of the Attorney General.

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SUPREME COURT, U.S.

No. 98-285

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JOHN HAMMONS, an individual, dba
FULL CIRCLE DISTRIBUTING, a sole proprietorship,
Petitioner,

v.

ALCAN ALUMINUM CORP., ALUMINUM COMPANY OF AMERICA, ALUMAX INC., KAISER ALUMINUM CORPORATION, REYNOLDS METALS CO., THE ALUMINUM ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PARTIES TO THE PROCEEDINGS BELOW

Plaintiff-Petitioner:

John Hammons, an individual, dba Full Circle Distributing, a sole proprietorship

Defendants-Respondents:

Alcan Aluminum Corp., a Delaware Corporation; Aluminum Company of America, a Pennsylvania Corporation; Alumax Inc., a Delaware Corporation; Kaiser Aluminum Corporation, a Delaware Corporation; Reynolds Metals Co., a Delaware Corporation; The Aluminum Association, a Delaware Corporation.

RULE 29.6 LISTING

Pursuant to Supreme Court Rule 29.6, each Respondent respectively lists below all of its parent companies and nonwholly owned subsidiaries, as may be applicable.

Alcan Aluminum Corp.

All of the shares of Alcan Aluminum Corporation ("Alcan") are held by Alcan Aluminium Ltd., which issues shares traded on the New York Stock Exchange. Alcan has no subsidiaries or affiliates that have issued shares to the public.

Alumax Inc.

The parent company of Alumax Inc. is Aluminum Company of America. Alumax Inc. has no nonwholly owned subsidiaries that have issued stock to the public.

Aluminum Company of America

The stock of Aluminum Company of America ("ALCOA") is traded on the New York Stock Exchange. Through certain of its wholly-owned subsidiaries, ALCOA

owns a minority interest in Reserve Industries, Inc. The stock of Reserve Industries, Inc. is publicly traded.

Kaiser Aluminum Corporation

Shares of Kaiser Aluminum Corporation ("Kaiser") are owned by MAXXAM, Inc. (27.90%) and MAXXAM Group Holdings, Inc. (35.40%). The remainder are widely held, with shares traded on the New York Stock Exchange. Charles E. Hurwitz, members of his family and trusts for the benefit thereof have approximately 68.9% of the combined voting power in MAXXAM, Inc. Kaiser has no subsidiaries or affiliates that have issued shares to the public.

Reynolds Metals Company

Reynolds Metals Company is a public company, with shares traded on the New York Stock Exchange. Reynolds Metals Company has no subsidiaries or affiliates that have issued shares to the public.

The Aluminum Association

The Aluminum Association has no parent or subsidiary corporations.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-285

JOHN HAMMONS, an individual, dba
FULL CIRCLE DISTRIBUTING, a sole proprietorship,
Petitioner,

v.

ALCAN ALUMINUM CORP., ALUMINUM COMPANY OF AMERICA, ALUMAX INC., KAISER ALUMINUM CORPORATION, REYNOLDS METALS CO., THE ALUMINUM ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

Respondents Alcan Aluminum Corp., Aluminum Company of America, Alumax Inc., Kaiser Aluminum Corporation, Reynolds Metals Co., and The Aluminum Association oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit reached by Judges Hall, Brunetti, and Rymer.

COUNTERSTATEMENT OF THE CASE

A. Preliminary Statement

None of the considerations set forth in the Court's Rule 10 is present here. In particular, the court of appeals'

decision does not conflict with relevant decisions of this Court, as Petitioner asserts, and none of the questions that the Petitioner seeks to present have divided the lower courts. To the contrary, the legal principles relied upon by the courts below are well-settled and their application to the facts pled in this case is fully consistent with the authorities of this Court.

In his desire to entice the Court's interest, Petitioner, who was plaintiff below, runs from the case that he pleaded.[1] Whereas he insists here that he is aiming at what he labels a "domestic price fix," his 47-page Verified Complaint challenges under California state antitrust law the negotiation among six sovereigns of an intergovernmental Memorandum of Understanding ("MOU") and Respondents' (defendants below) petitioning activity in connection therewith. In that pleading, Petitioner named the signatory sovereign governments, including the United States, as antitrust co-conspirators; he attacked as unlawful an intergovernmental agreement negotiated at the behest of the Russian Federation by the United States Trade Representative ("USTR") with consultation by the Justice Department; and he asserted antitrust liability against Respondents for having acted as advisors at the request of the USTR during the course of the intergovernmental negotiations. The courts below had no difficulty in concluding that each of the Political Question, Act of State, and *Noerr-Pennington* doctrines bars Petitioner's broadscale challenge to governmental conduct and protected petitioning activity, especially in an area of sensitive foreign policy committed to the discretion of the Executive Branch.

---

[1] Respondents object to Petitioner's "Questions Presented" for this reason. Each contains the false assumption—which is contrary to the record of the proceedings and the Verified Complaint—that Petitioner alleged different claims than he did. His "Questions" are neither presented by the case nor worthy of certiorari review.

For these reasons, Petitioner cannot—and does not—cite any specific misstatement of law made by either of the lower courts. Rather, Petitioner claims here that he is leaving behind all of his verified allegations and would have this Court focus on a purported claim of domestic price-fixing. Yet, stripped of the underlying allegations about the intergovernmental MOU, there remains no factual allegation by Petitioner to make out a price-fixing claim. Moreover, when the lower courts afforded him an opportunity to bring forward any relevant facts not pleaded to support a price-fixing theory asserted in his briefs, he could not. Two courts already have parsed the Verified Complaint, deemed its allegations as true (a point Petitioner does not dispute), applied the undisputed legal principles to the facts pleaded, and found nothing there. Both courts properly declined to credit Petitioner's revisionist arguments as to the claim pleaded in the Verified Complaint.

Petitioner's brief here simply attempts to make this case something it is not. No facts are alleged to support the case Petitioner wishes he could plead. No pleading supports the case he characterizes before this Court. No caselaw or conflict supports his effort to interest this Court in a matter that, from the face of the Verified Complaint, is plainly barred by the Political Question doctrine, by the Act of State doctrine, and by the *Noerr-Pennington* doctrine.

B. Counterstatement of Facts

Purporting to represent a nationwide class of all direct and indirect purchasers of primary aluminum manufactured by Respondents from January, 1994 to March, 1996, Petitioner challenges as illegal a multi-government effort to negotiate and resolve an international aluminum crisis. In the words of the Verified Complaint, it "challenges as illegal [under California's Cartwright Act] the actions of [Respondents] and their co-conspirators in creating and implementing an agreement, combination and

conspiracy and concert of action amongst themselves in conjunction with a Memorandum of Understanding entered into by the Russian Federation, Canada, and the United States to restrict the production of primary aluminum." [Verified Complaint, ¶ 1.] The "co-conspirators" are identified as the Signatories to the MOU (the governments of the Russian Federation, the United States, the European Union, Canada, Australia, and Norway). [*Id.* ¶¶ 18, 42-43.]

Throughout the Verified Complaint, Petitioner (a bicycle maker) placed this intergovernmental MOU at the center of his case. As recounted in his Verified Complaint, this international crisis arose out of the collapse of Communism. Aluminum from countries of the former Soviet Union, once used internally for military applications, was redirected as exports to flow throughout the world. This flood of Russian aluminum caused the European Union to impose trade sanctions in the form of interim quotas on Russian aluminum imports. The Russian Federation feared retaliation from other countries as well. It took the view that the imposition of expanded trade barriers would be "fraught with serious negative economic and social consequences." [*Id.* ¶ 40.] According to the Verified Complaint, the other governments that subscribed to the MOU shared the belief that "if [the trade talks] are unsuccessful, unilateral trade sanctions may be imposed by governments or private parties." [*Id.* ¶ 52.]

The public record confirms these political circumstances. A public document was presented during the summary judgment briefing showing that the USTR issued a *Federal Register* notice entitled *Request for Public Comment on Strategies To Address Increased Exports of Primary Aluminum From Newly Independent States.* 58 Fed. Reg. 50061 (1993). The USTR sought public comment on the effect of Russian aluminum on the world aluminum market, the issues raised by the EU quota, and potential government strategies to address the situation. Two joint letters were sent by twenty-four Senators and

forty-six Congressmen to President Clinton urging that multi-government negotiations begin immediately to address Russian aluminum exports. In January, 1994, President Clinton, in several addresses at the Kremlin and in Eastern European countries, emphasized the policies of keeping economic reform going in Russia while at the same time helping the Russian people. Speaking of Russia's continuing transition, he stated, "One of our priorities, therefore, should be to reduce trade barriers to the former Communist states. . . . The economic success of these states simply cannot be separated from our own removal and security."

The Verified Complaint asserts that the Russian Federation—recognizing "the crisis existing in the world market for primary aluminum"—invited the governments of the six major aluminium producing nations to participate in a series of meetings to address the global aluminum situation. [*Id.* ¶ 40.] The Verified Complaint asserts that the alleged agreement to reduce production took place at multilateral talks in Moscow, Washington, D.C., and Brussels between the representatives of the six Signatory Nations during October, 1993 to March, 1994. [*Id.* ¶¶ 2, 3, 5, 40-42.]

The United States, according to the Verified Complaint, participated in the intergovernmental consultation through the USTR. [*Id.* ¶ 50.] In so participating, "[t]he United States government . . . requested input from the U.S. aluminum industry." [*Id.*] Thus, the Respondents' role in the process was "as advisors to the U.S. Trade Representative" during the course of the intergovernmental negotiations. [*Id.; see also id.* ¶ 41.] During the course of the discussions, the U.S. Government "conduct[ed] a review as regards legal requirements related to the Memorandum of Understanding." [*Id.* ¶ 44.]

According to the Verified Complaint, the culmination of these governmental meetings was the agreement to the Memorandum of Understanding by the six sovereigns, including the United States. The MOU was attached to and incorporated in the Verified Complaint. The unique

world-wide political events that precipitated the sovereigns' negotiation of the MOU are set forth in the text of the document itself.

- The MOU expressly recognized that "the world aluminum industry is facing a grave, exceptional and unforeseeable situation involving a considerable current excess global supply of primary aluminum."
- The Signatory Nations agreed that "these present structural problems are due to an unanticipated combination of political and economic developments which is unlikely to re-occur."
- The Signatory Nations considered that "unilateral trade actions [such as the EU quota that had been put into effect] are not the preferred response to the current aluminum market problems" and stated that such actions would be inconsistent with the MOU.
- In the assessment of the Signatory Nations, the "principal response to this situation should be by way of world-wide market-oriented commercial decisions by companies on an individual basis."
- The MOU noted the intention of the Russian Federation to decrease the production of primary aluminum by 500,000 metric tonnes per year.
- The Signatory Nations "noted that commercial decisions by producers in other States could also be expected to facilitate the return to normal market conditions."
- The sovereigns considered that, on the basis of their objective analysis of conditions in the aluminum market, their assessment of possible adjustment by market-oriented commercial decisions by producers in other states, as well as the Russian Federation's commitment to reduce production by 500,000 metric tonnes per year, the situation in the world aluminum market showed a likely aggregate reduction in worldwide production of an amount compatible with the assessment of a global

excess supply of 1.5 million to 2 million metric tonnes per year.

- The Signatory Nations agreed to examine "all means" available "to provide technical and other assistance to the Russian Federation to facilitate modernization, the improvement of environmental standards and the development of internal aluminum consumption." They also committed to specific forms of cooperation, assistance, and foreign aid to the Russian Federation.

According to the Verified Complaint, in connection with the negotiation of the MOU, the Russian Federation reiterated in a unilateral statement in January, 1994 its intention to reduce Russian production of primary aluminum and clarified that it possessed and intended to use the legal means at its disposal to cause Russian producers to implement this reduction. It reiterated that the other Signatory Nations were to "refrain from maintaining existing protectionist measures or introducing new ones in the trade in aluminum." [*Id.* Exh. 9.] In a March, 1994 unilateral statement, the Russian Federation confirmed that the MOU "reflects the general expectation that market forces are likely to lead to the world-wide reduction in annual aluminum production." [*Id.* ¶ 45.]

In the seventy paragraphs of the Verified Complaint, the only joint action ascribed to Respondents is their alleged participation as "advisors" to the United States in regard to these intergovernmental negotiations. [*Id.* ¶¶ 41, 43, 50.] No agreement among or other joint activity by Respondents is alleged.

Similarly, the single allegation of commercial (as opposed to political) conduct by Respondents is asserted individually as to each Respondent: that each producer cut back production at some time after the MOU and with knowledge of the intergovernmental agreement. Petitioner then alleges: the "effect of the conduct of [Respondents] and their co-conspirators [the six governmental signatories] was to cause the Western World production

of primary aluminum to decrease." Petitioner claims that the result was an increase in primary aluminum prices, injuring purchasers.

Respondents moved to dismiss the Verified Complaint on the grounds that the assault on the negotiation of the intergovernmental agreement and on Respondents' petitioning conduct concerning it were barred by each of the doctrines of Political Question, Act of State, and *Noerr-Pennington*. Respondents also demonstrated that Petitioner's sole remaining factual allegation—that each producer cut production after the MOU—failed to state a claim because mere parallel conduct is not actionable under the antitrust laws.

Petitioner responded below to the motion to dismiss with arguments from his lawyer that his antitrust case was based upon a theory of a "domestic price fix." But no factual allegations in his Verified Complaint supported such an argument. Nor was Petitioner able to reconcile such a theory with the Verified Complaint, which was centered on the MOU and its Signatory Nations.

The district court afforded Petitioner the opportunity to offer or identify any and all factual material he had concerning a purported price-fix by converting the motion to dismiss to one for summary judgment. Petitioner set forth no such facts, however, and never sought to amend the Verified Complaint. His summary judgment brief reiterated a "domestic price-fix" theory, bare of any supporting facts, and asked for an outright denial of summary judgment or a continuance to conduct discovery. He failed to identify facts that justified further inquiry, submitting only material, much of it retrieved from government files through the Freedom of Information Act, that had nothing to do with a domestic price-fix.

After the district court granted summary judgment in favor of Respondents, Petitioner moved for reconsideration, relying on the same arguments. His motion was denied. He appealed to the Ninth Circuit, and, after re-

ceiving a one-page memorandum decision affirming the district court, sought rehearing *en banc*. Rehearing was denied, and no judge asked for a vote on the *en banc* request. Now, having made his argument five times to two courts, and been denied each time, Petitioner asks this Court to revisit the same well-settled legal principles and, on assumptions neither pled in the Verified Complaint nor shown otherwise to have a factual basis, to reinstate a lawsuit found by the courts below to have no life in it.

REASONS TO DENY THE PETITION

The Verified Complaint was dismissed for three independent reasons, and there is no reason for the Court to review the decisions of the lower courts.

I. NO ISSUE MERITS REVIEW CONCERNING THE FINDING THAT THE POLITICAL QUESTION DOCTRINE BARS THE CLAIM PLEADED BY THE VERIFIED COMPLAINT

The decisions of the courts below are squarely consistent with *Baker v. Carr*, 369 U.S. 186 (1962). Petitioner's dissatisfaction with the effect of those principles when applied to his claim presents no reason for this Court to exercise its supervisory powers.

Baker v. Carr was cited to the lower courts by both parties. Indeed, the district court's opinion relied on *Baker's* progeny in applications that are analogous to this case: challenges to the conduct of the Executive Branch in the foreign policy area, *Dole v. Carter*, 569 F.2d 1109 (10th Cir. 1977); challenges to the substance of a trade agreement, *Sneaker Circus, Inc. v. Carter*, 566 F.2d 396 (2d Cir. 1977); and challenges to the grant of foreign aid. *Dickson v. Ford*, 521 F.2d 234 (5th Cir. 1975), *cert. denied*, 424 U.S. 954 (1975). The district court and court of appeals properly found that the claims asserted in the Verified Complaint were barred by the Political Question doctrine.

Petitioner contends here, as he did in the courts below, that *Baker v. Carr* poses no bar because the alleged violations purportedly arise from some domestic price-fix "outside the context of the MOU." Petition at 7. But that is not what his Verified Complaint states. Nor did Petitioner amend his Complaint. And he did not provide any facts outside the Verified Complaint, even when given the opportunity to do so through the vehicle of summary judgment.

The district court properly found that Petitioner's claims fell far short of alleging any such domestic price-fix. Mere parallel conduct by producers does not amount to an allegation of price-fixing, *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954), and Petitioner does not argue otherwise here.

II. NO ISSUE MERITS REVIEW CONCERNING THE FINDING THAT THE ACT OF STATE DOCTRINE BARS THE CLAIM PLEADED BY THE VERIFIED COMPLAINT

There is no conflict between the decisions in this case and the parameters of the Act of State doctrine as established by the decisions of this Court. *E.g., W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 697 (1976); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). The doctrine precludes adjudication of claims like Petitioner's, which challenge "the effect of official action by a foreign sovereign." *Kirkpatrick*, 493 U.S. at 406.

The only agreement alleged in the Verified Complaint is the MOU negotiated and subscribed to among sovereigns. And the MOU provisions hinge upon the Russian Federation's agreement to cut production of Russian aluminum within its own borders. Such direct attacks on

the Russian sovereign's actions are prohibited by *Kirkpatrick* because they require the courts to decide the official acts of Russia.

Here, too, Petitioner cannot escape this doctrine by refashioning his case to argue here that it presents a price-fix. The Petitioner's argument in his petition that "[R]espondents' activities of private price-fixing did not . . . reflect any decision of a foreign government," Petition at 14, notably fails to mention that no activities of private price-fixing were pleaded or shown by factual material.

III. NO ISSUE MERITS REVIEW CONCERNING THE APPLICATION OF THE *NOERR-PENNINGTON* DOCTRINE TO RESPONDENTS' ALLEGED JOINT PETITIONING CONDUCT

The doctrine that petitioning activities at all levels and branches of government, including the Executive, are insulated from antitrust liability is well-established. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Its parameters have been well-defined by this Court over the years. *E.g., City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). The courts below properly applied this *Noerr-Pennington* doctrine to bar Petitioner's claims about Respondents' joint petitioning activity.

The Verified Complaint concedes, as it must, that "[t]he United States government . . . requested input from the U.S. aluminum industry" and that Respondents' roles in the process were, accordingly, "as advisors to the United States Trade Representative." Verified Complaint, ¶ 50. The courts below correctly concluded that such petitioning activity is protected and not actionable as a matter of law.

Petitioner's arguments in this Court on this doctrine are non-sequiturs. He asserts in his brief that the U.S. government made no commitment regarding production cutbacks by U.S. producers. This is both unremarkable and ineffective for Petitioner's argument. The point remains that no factual allegations of a domestic price-fix were pleaded. Petitioner's argument that no such U.S. commitment was made and no petitioning for a domestic price-fix was undertaken does nothing to establish that any act of domestic price-fixing was alleged. Similarly, in asserting that Respondents cannot shield domestic price-fixing conduct because they did not petition the government to allow such conduct, Petition at 15, Petitioner assumes that price-fixing was both pleaded and supported with material facts. Neither circumstance occurred.

In presenting his argument to this Court on this point, Petitioner has, on at least four occasions, made the bare statement that Respondents engaged in a private U.S. domestic price-fix. Petition at 15, 17, 19. So stating in a petition does not fill the void of pleadings and supporting factual material regarding any such theory. Petitioner has offered nothing, either here or below, addressing that deficiency.

IV. NO ISSUE MERITS REVIEW CONCERNING THE DISTRICT COURT'S DISCRETIONARY PROCEDURAL STEPS, WHICH PROVIDED PETITIONER ADDITIONAL OPPORTUNITIES TO PROVIDE EVIDENCE IN SUPPORT OF HIS CLAIM

The Verified Complaint was deficient for failing to state a claim on which relief could be granted, and the district court might properly have dismissed it on that ground alone without affording any additional process. Instead the trial court converted the matter to a motion for summary judgment "so that all parties would be given reasonable opportunity to present all material pertinent to the motion." Petition at 8a. This procedural step is within the district court's discretion, and allowed Peti-

tioner the opportunity to bring forward any facts he had failed to plead.

This procedure is entirely consistent with this Court's authorities. The Court has made clear, a decade after the dicta from the opinion in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962) (quoted in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 602 (9th Cir. 1976), *cert. denied*, 472 U.S. 1032 (1985))—on which Petitioner relies—that summary judgment is not "disapproved" in antitrust cases any more than in other cases. Rather, the standards require that the party seeking to defeat the motion come forward with a *genuine* issue of *material* fact. *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Generalized allegations or conclusory assertions are not sufficient. *Id.; see also Schroeder v. McDonald*, 55 F.3d 454, 460 (9th Cir. 1995) (conclusory allegations in Verified Complaint do not suffice to oppose summary judgment).

Moreover, where a party is unable to allege any facts or to adduce any evidence to support a claim for relief, he is not entitled to discovery. *See Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987) (affirming stay of discovery pending ruling on a motion to dismiss where court assumed truth of all well-pleaded allegations of the complaint). Where the claim asserted is on its own terms legally insufficient—as the courts below found in this case after assuming the pleaded allegations to be true—summary judgment is proper regardless of a request for discovery. *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1379 (10th Cir. 1990), *cert. denied*, 498 U.S. 1074 (1991); *Hall v. Hawaii*, 791 F.2d 759, 761 (9th Cir. 1986).

Petitioner's argument conveniently disregards the district court's attempt to help the Petitioner by offering him the chance to bring forth relevant unpleaded factual mate-

rial. The failure to identify any factual material to supplement his deficient pleading revealed that Petitioner could not support his claimed afterthought that Respondents had engaged in some "private price-fix." In truth, Petitioner's only claim was the one set forth in his Verified Complaint centered upon the intergovernmental MOU. This claim was barred by each of the well-settled doctrines of Political Question, Act of State, and *Noerr-Pennington*.

V. NO ISSUE MERITS REVIEW CONCERNING DISMISSAL OF THE ALUMINUM ASSOCIATION FOR LACK OF PERSONAL JURISDICTION

The Aluminum Association further opposes the petition for a writ of certiorari on the question of personal jurisdiction. Dismissal of the Aluminum Association for lack of personal jurisdiction was consistent with well-settled due process requirements that limit a state's power to assert *in personam* jurisdiction over a Respondent lacking minimum contacts with the forum, as this Court has often held. *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985); *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977). "[T]he constitutional touchstone remains whether the Respondent purposefully established 'minimum contacts' in the forum State." *Burger King*, 471 U.S. at 474. The foundation of specific jurisdiction —a "'relationship among the Respondent, the forum, and the litigation'"—is simply lacking here. *Helicopteros Nacionales*, 466 U.S. at 414 (*quoting Shaffer*, 433 U.S. at 204).

Petitioner argues that the "but for" test applied below is unsettled in the Ninth Circuit after *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267 (9th Cir. 1995). Petitioner, however, is incorrect. As stated by the Ninth Circuit more recently in *Doe v. American National Red*

Cross, 112 F.3d 1048, 1052 (9th Cir. 1997): "[T]he 'but for' test is still employed in determining whether a Petitioner's injuries arose out of a Respondent's forum-related activities."

There is, in any event, no reason for this Court to examine the jurisdictional issue in this case. Petitioner neither alleged nor offered any evidence that the Aluminum Association's occasional, attenuated California contacts relate in any way to the claimed conspiracy. As the district court properly found, the sole allegation linking the Association to the claimed conspiracy is that it acted as advisor to the United States government during intergovernmental meetings held outside of California. Such non-California activities by the Association provides no basis for an assertion of jurisdiction under any test comporting with due process. That finding below was a routine application of established jurisdictional principles, and presents no issue warranting this Court's review. *See, e.g., Helicopteros Nacionales*, 466 U.S. at 415.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 98-285

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

JOHN HAMMONS, an individual, dba FULL CIRCLE DISTRIBUTING, a sole proprietorship,

Petitioner

v.

ALCAN ALUMINUM CORP. a Delaware corporation; ALUMINUM COMPANY OF AMERICA, a Pennsylvania corporation; ALUMAX INC., a Delaware corporation; KAISER ALUMINUM CORPORATION, a Delaware corporation; REYNOLDS METALS CO., a Delaware corporation; ALUMINUM ASSOCIATION, a Delaware corporation,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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JOHN HAMMONS, an individual, dba FULL CIRCLE DISTRIBUTING, a sole proprietorship,

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Respondents

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

The Petition clearly shows that the lower courts exceeded the requirements of the Political Question Doctrine, the Act of State Doctrine, and the *Noerr-Pennington* Doctrine in dismissing this case.

Although Respondents assert that Petitioner should have amended the Complaint, Respondents forget that Petitioner was not given the opportunity to amend the Complaint since the motions to dismiss were converted to a motion for summary judgment, without any opportunity for discovery.[1]

Contrary to Respondents' assertions, the Complaint alleges that Respondents violated the Cartwright Act by engaging in a scheme to fix the price of primary aluminum in the United States, through the curtailment of production. The curtailment occurred through Respondents acceptance of the premise of a January 1994 letter of the Russian Federation which stated that the Russian Federation would curtail its production with the "understanding that - the total reduction in world aluminum production outside Russia will amount to not less than 1.5 million tons compared with the level as of November 1993". (Complaint ¶ 40.)

This central premise of the Complaint supports Petitioner's contention that the Complaint sufficiently pleaded a cause of action without being barred by the Political Question, Act of State and Noerr-Pennington Doctrines.[2]

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[1] New facts received pursuant to Freedom of Information Act requests were presented to the Court of Appeal. On October 5, 1998, Petitioner received documents in response to a March 19, 1996, Freedom of Information Act request AT96-088. Some of these documents are attached to the Appendix to Reply, filed concurrently herewith.

[2] Contrary to Respondents' argument, Petitioner does not challenge the Memorandum of Understanding (hereinafter "MOU") itself. The MOU was included in the Complaint to provide the background which preceded Respondents' decision to engage in a domestic price fix.

However, assuming that the Complaint did challenge the MOU, as Respondents contend, recently received documents set forth in the Appendix show that the purpose of the MOU was an illegal curtailment of production and that the MOU was regarded as an "aluminum cartel" by its participants. (Appendix exhibit 2.)[3]

In *Consumer's Union of U.S. Inc. v. Rogers*, 352 F.Supp. 1319 (D.C.D.C. 1973), in which a consumer organization challenged restraint arrangements on steel mutually made between

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[3] The Aluminum Association, in its Resolution dated September 10, 1993, stated that "The Aluminum Association recommends ... CIS Aluminum is marketed in an orderly fashion ...". (Appendix exhibit 3.) Richard G. Holder, the Chairman and Chief Executive Officer of Reynolds Metals Company and Chairman of The Aluminum Association, in a speech dated December 1, 1993, to the MOU negotiators stated "Temporary Russian production curtailments and a cap on exports are a necessary part of an overall solution ...". (Appendix exhibit 4, p. 16.) The Summary Record Of Informal Multilateral Aluminum Meeting held in Washington, D.C. on 1-2 December, 1993, stated "... Need for global burdensharing of transition-created difficulties which coincide with world recession." (Appendix exhibit 5, p. 1.) The U.S. Government telex dated January 1994, at paragraphs 3, 4 and 5 referred to international agreements to curtail production as illegal. (Appendix exhibit 6 p. 1 and 2.) The Russian cut-back of aluminum production was linked to the Russian Federation letter of January 1994. (Appendix exhibit 7, p. 1.) A chart of production cut-backs show U.S. cut-backs during March and April 1994. (Appendix exhibit 8.) And a U.S. Justice Department memorandum referred to the MOU as a Russian cut-back of 10% and other governments predicted cut-backs in their industries of 2 to 3 times the half million metric ton Russian cut-back. (Appendix exhibit 9, p. 1.)

foreign companies as a result of negotiations initiated by the Secretary of State, at the direction of the President, the court held that the Executive had no authority to exempt the voluntary restraint arrangements from the antitrust laws. The Court also held that the Executive could enter into such arrangements so long as they did not violate legislation regulating foreign commerce.[4]

Therefore, under *Consumer's Union of U.S., Inc.*, the Executive does not have the authority to enter into an MOU that would violate U.S. antitrust laws.

REASONS FOR GRANTING THE PETITION

A. THE LOWER COURTS' FINDING THAT THE POLITICAL QUESTION DOCTRINE BARS THE COMPLAINT MERITS REVIEW

In Petitioner's view, the Complaint does not require the court to adjudicate either the validity of the signatory nations'

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[4] The Court specifically stated at page 1323 as follows:
". . .The President clearly has no authority to give binding assurances that a particular course of conduct, even if encouraged by his representatives does not violate the Sherman Act or other related congressional enactments any more than he can grant immunity under such laws . . . The President must faithfully execute the law and cannot permit his subordinates to be participants in such a combination or agreement. There is no basis in the Constitution or case law for a contrary conclusion. Defendants cite *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), but the exception from Sherman Act strictures there recognized was based on legislative action and it cannot be said that the Executive charged with responsibility to execute the law can also create his own exceptions." [Emphasis added]

actions in negotiating and signing the MOU, or the validity of the MOU itself. The Complaint in the instant case does not satisfy the six criteria established by the Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1961).

Respondents dispute the Petition without establishing that each *Baker* criteria was applicable to the instant case. Respondents merely assert conclusory statements that the lower courts' decisions properly relied on three appellate opinions.[5]

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[5] However, when analyzed, these three appellate opinions are inapplicable to the instant case. *Dole v. Carter*, 569 F.2d 1109 (10th Cir. 1977), involved an action for an injunction by a United States Senator to prevent the return of a crown of St. Stephen and related regalia to Hungary pursuant to decision by the President. The court declined to consider the case on political question grounds because it was a situation which "'uniquely demand[s] single-voiced statement of the Government views.'" *Id.* at 1110 (quoting *Baker, supra.*)

Dickson v. Ford, 521 F.2d 234 (5th Cir. 1975), *cert. denied*, 424 U.S. 954 (1975), involved a taxpayer suit challenging the constitutionality of the Emergency Security Assistance Act of 1973, which authorized emergency military assistance of Israel. The court held that the determination of whether military aid should be given to Israel was a political question.

These cases are inapplicable because the instant case does not satisfy the six criteria set forth in *Baker, supra*, that would warrant the application of the Political Question Doctrine.

Sneaker Circus, Inc. v. Carter, 566 F.2d 396 (2d Cir. 1977), supports Petitioner's position. In *Sneaker Circus, Inc.*, the court considered an action which challenged the procedures the Executive used to enter into trade agreements regarding footwear exported from the Republic of Korea and the Republic of China. The court found that the political question doctrine did not bar adjudication of the case because it did not challenge the substance of the trade agreements. Rather, it challenged the procedures employed by the Executive in entering into such trade agreements, which are within the proper supervision of the court. *Id.* at 402.

The Complaint alleges that Respondents, knowing that the Russian Federation would only decrease its aluminum production if the western producers reduced their production, (Complaint ¶ 40) decided to enter into an agreement to decrease their own domestic production. (Complaint ¶¶ 37-54.) The Complaint alleges that the effect of the decrease in production of aluminum resulted in an artificial scarcity that increased the domestic prices of aluminum. (Complaint ¶¶ 55 - 56.)[6]

B. THE LOWER COURTS' FINDING THAT THE ACT OF STATE DOCTRINE BARS THE COMPLAINT MERITS REVIEW

The Act of State Doctrine only requires that acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid. *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 409 (1990). The Act of State Doctrine does not exempt a private party from antitrust liability, nor does it insulate a foreign government from illegal antitrust conduct outside of its territory.

Sneaker Circus, Inc., supports Petitioner's position since the instant action does not challenge the MOU itself. It challenges the conduct of Respondents to use the MOU as a cover to conduct their own agreement to decrease production of aluminum, in response to the January 1994 Russian Federation letter.

[6] On the other hand, accepting Respondents contention that the MOU is being challenged, the MOU would be illegal as set forth under Consumer's Union.

The Complaint specifically alleges that Respondents entered into an "agreement, combination and conspiracy and concert of action because an agreement reducing production among the producers of primary aluminum would create an artificial scarcity creating higher primary aluminum prices and producing higher corporate profits with lower levels of production." (Compl. ¶ 54.)

The Complaint further alleges that the aforementioned agreement between Respondents resulted in the reduction of primary aluminum production and the resulting increase in aluminum prices. (Compl. ¶ 55.)

The Complaint alleges that the production cuts were based upon the January 1994 letter of the Russian Federation (Complain ¶ 40 and 48 - 54). The Complaint does not attack the Russian Federation's actions within its own borders. References to the official acts of the Russian Federation within its borders were included in the Complaint to provide additional evidence of Respondents' agreement in response to the Russian Federation's January 1994 letter to engage in this anti-competitive conduct.[7]

C. THE LOWER COURTS' FINDING THAT THE NOERR-PENNINGTON DOCTRINE BARS THE COMPLAINT MERITS REVIEW

As shown above, the curtailment of production was specifically set forth in the Complaint.

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[7] On the other hand, accepting Respondents' contention that the MOU is being challenged, the MOU itself is illegal.

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This case is not barred by the *Noerr-Pennington Doctrine* because the Complaint does not make any allegation that Respondents petitioned the government to authorize a domestic reduction of aluminum production. The Complaint alleges that participants to the MOU consider that the aluminum industry should operate on the basis of fair competition. (Compl. Exhibit 11, p.2.) Since the U.S. government was a participant in the MOU, and the particular agreement by Respondents to engage in a domestic price fix was not condoned by the MOU, it is clear that there could be no petitioning activities by Respondents that are protected by the *Noerr-Pennington Doctrine*.[8]

On the other hand, accepting Respondents' contention that the MOU is at issue, Appendix Exhibits 3 and 4 show The Aluminum Association specifically requesting world-wide curtailment of production, which would render the MOU illegal.

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[8] The court in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225-27 (1940), stated as follows:

> The fact that Congress through utilization of the precise methods here employed could seek to reach the same objectives sought by respondents does not mean that respondents or any other group may do so without specific Congressional authority . . . . Though employees of the government may have known of those programs and winked at them or tacitly approved them, no immunity would have thereby been obtained. For Congress had specified the precise manner and method of securing immunity. None other would suffice. Otherwise national policy on such grave and important issues as this would be determined not by Congress nor by those to whom Congress had delegated authority but by virtual volunteers. (Emphasis supplied).

D. THE DISTRICT COURT'S DECISION TO CONVERT RESPONDENTS' MOTION TO DISMISS TO A MOTION FOR SUMMARY JUDGMENT MERITS REVIEW

Summary disposition of the case without allowing for adequate discovery is inappropriate. *Timberlane Lbr. Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976), cert. denied in 472 U.S. 1032, 105 S.Ct. 3514 (1985).

Under *Timberlane,* it was improper for the District Court to deny Appellant the opportunity to obtain evidence of Defendants-Appellees' misconduct prior to disposing of the matter on summary judgment.

The district court's action is especially egregious in this instance, where Petitioner seeks to challenge Respondents on antitrust issues, where motives and intent play leading roles, and proof is largely in the hands of Respondents. *Poller v. Columbia Broadcasting System, Inc.* 368 U.S. 464, 473 (1962).

E. THE LOWER COURTS' FINDING THAT THE COURT LACKED PERSONAL JURISDICTION OVER THE ALUMINUM ASSOCIATION MERITS REVIEW

As stated in the Petition, the lower courts erred in applying the "but for" test in ruling that Respondent Aluminum Association's contacts were insufficient to establish personal jurisdiction.

But for The Aluminum Association's participation in the agreement to reduce the production of aluminum, the price fixing and conspiratory activities would not have succeeded.

Further, The Aluminum Association's forum related activities were sufficient to warrant the exercise of personal jurisdiction. Respondents' contacts with California consisted of correspondence and personal meetings with California based-members, including its alleged co-conspirator Kaiser Aluminum & Chemical Corporation.

CONCLUSION

Based on the foregoing, the petition for writ of certiorari should be granted.

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